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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHRISTOPHER RAMIREZ et al.,

Plaintiffs and Appellants,

v.

PATTI LA RUE, as Trustee, etc.,

Defendant and Respondent.

B283677 c/w B286574
(Los Angeles County
Super. Ct. No. LP016362)

APPEAL from an order of the Superior Court of Los Angeles County, David S. Cunningham, III, Judge. Affirmed in part and reversed in part.

Borg & Duisters, Rickard L. Borg and Lorin R. Clark for Plaintiffs and Appellants.

McBride Law Group and Julia C. McBride for Defendant and Respondent.

Appellants Christopher and Barbara Ramirez and respondent Patricia LaRue are co-beneficiaries of a testamentary trust (the Trust) created by decedent Geneva Baird (Geneva). Respondent is also the trustee. Respondent distributed the assets of the Trust in 2006, advising appellants that they were receiving more than their testamentary share. Five years later, appellants sought and obtained a formal accounting under Probate Code section 16062. After a 2015 trial, the court approved that accounting, which covered the period from September 10, 2004 to April 30, 2007, but found that respondent had been a de facto trustee for all of 2004 and directed respondent to prepare an accounting for the period from January 1 to September 9, 2004. Appellants challenge the orders approving the latter accounting and awarding respondent attorney fees and costs, including expert witness fees, for contesting the accountings in bad faith and without reasonable cause.

Appellants contend (1) the most recent accounting was not supported by admissible evidence; (2) respondent's expert relied on hearsay; (3) the court was divested of jurisdiction because respondent failed to pay a filing fee; (4) the court abused its discretion in first continuing the trial on its own motion, and later refusing to continue it when appellants' expert became ill; and (5) the evidence does not support the court's finding that appellants did not suffer damage. They further contend the record does not demonstrate that their contest was in bad faith and without

reasonable cause and assert that the court had no basis to award expert witness fees. We reverse the award of expert witness fees, but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1995, decedent Geneva created, and placed her assets into, the Trust.[1] The provisions of the Trust stated that after her death, 90 percent of the Trust's assets would go to her daughter, respondent Patricia LaRue, and 2-1/2 percent to each of her four grandchildren, including appellants Barbara and Christopher Ramirez. As is usual for such trusts, Geneva named herself the trustee. The Trust provided that should she die or "for any reason" become unable to serve, respondent would become the successor trustee. It further stated: "If any person acting as a Trustee hereunder suffers from a condition of incompetence, such Trustee shall cease to act as Trustee until such condition of incompetence ceases."

Sometime before her death, Geneva contracted Alzheimer's, which eventually caused her to become

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[1] The assets originally placed into the Trust consisted of a home in Van Nuys and four bank accounts or certificates of deposit at Wells Fargo Bank, Home Savings of America and Great Western Bank. The schedule of assets was subsequently updated to state that Trust assets consisted of a home in Valencia, and bank accounts or certificates of deposit at Washington Mutual and Wells Fargo.

mentally incompetent. She gave respondent a general power of attorney on September 10, 2004, and executed a document formally naming respondent successor trustee on October 16, 2004. In September 2005, Geneva moved into an assisted living facility. She died in April 2006 at the age of 94.

A. *First Accounting and Trial*

In September 2006, respondent distributed $20,000 to each grandchild, expressing the belief that it represented several thousand dollars more than their 2-1/2 percent share of the Trust assets. Five years later, in December 2011, appellants filed a petition to compel an accounting and to remove respondent as trustee. The petition claimed that Geneva had been mentally incompetent for years prior to her death, and that while acting as trustee, respondent had made improper distributions of Trust assets to herself and her immediate family members.[2]

On September 27, 2012, respondent filed a first and final account and petition for settlement (the first accounting). It covered the period from September 10, 2004, when respondent was given the power of attorney, to April

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[2] Appellants amended their petition multiple times. In the operative fourth amended petition, they contended Geneva had been mentally incapacitated since 1995, and that respondent had exerted undue influence to induce Geneva to leave her the majority of the Trust's assets. In December 2013, the court sustained a demurrer without leave to amend based on the statute of limitations to the undue influence cause of action.

30, 2007. The first accounting indicated that after the sale of the stocks and the home and the payment of various expenses, the Trust had cash assets available for distribution of approximately $694,000, out of which the grandchildren were entitled to approximately $17,350 each (2-1/2% of $694,000), and that respondent had disbursed $20,000 to each grandchild five years earlier.[3] According to the first accounting, disbursements made by respondent prior to Geneva's death totaled approximately $95,000 and went primarily to the assisted living facility, a home health care provider, and household and medical expenses.[4] The

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[3] The first accounting showed that at the time of Geneva's death on April 7, 2006, the Trust held cash in four bank accounts or certificates of deposit at Washington Mutual and Wells Fargo totaling $173,512.49, stocks valued at $81,120.86 and a real property valued at $460,000, for a total of $714,633. Certain receipts (interest, stock dividends and retirement income) increased that amount to $754,581.72. The accounting included two joint accounts held at Bank of America and Washington Mutual in Geneva's and respondent's names with minimal balances. The accounting stated that prior to the distribution, the stocks and real property were sold for more than their assessed value -- $86,642.72 and $534,900 -- but the cash in the bank accounts and certificates of deposit had been reduced due to payment of various expenses, including the costs associated with selling the real property.

[4] The costs of the assisted living facility alone totaled over $30,000, and a similar amount was paid to the home health care provider. Over $3,000 had gone for supplemental insurance and a similar amount for doctors, prescriptions and utilities for the home.

disbursements included $4,327.28 under the category of "Gifts." In addition, under the category of "Groceries" totaling $3,680.76, most of the funds had been disbursed to respondent's husband.

Appellants filed objections to the first accounting on various grounds, and specifically contended that Geneva had been mentally incapacitated from at least July 2004.

A trial on the first accounting and appellants' objections commenced September 22, 2015 and concluded October 19, 2015. In February 2016, the court issued the following ruling on the issues raised: "1. [Appellants] have not demonstrated any harm to their interests, as required under *Estate of Giraldin*[5], and are therefore not entitled to damages; [¶] 2. This First and Final Account of Successor Trustee and Attorney-in-Fact, for the period of September 10, 2004 through April 30, 2007, is settled, allowed and approved in its entirety; [¶] 3. All acts and proceedings of [respondent] as Trustee and as Attorney-in-Fact during the period of the Accounting are confirmed and approved; [¶] 4. [Respondent's] acts in paying out funds for the care and benefit of Geneva Baird, and administrative expenses,

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5 In *Estate of Giraldin* (2012) 55 Cal.4th 1058, the Supreme Court held that "so long as the settlor is alive, the trustee owes a duty solely to the settlor and not to the beneficiaries" (*id.* at p. 1066), but that the beneficiaries have standing after the settlor's death to assert a claim for "a breach of the duty the trustee owed the settlor to the extent that breach harmed the beneficiaries." (*Id.* at p. 1076.)

during the period of the Accounting are approved as to the Geneva M. Baird Trust; [¶] 5. The distribution of Trust assets is approved[.]"

The court further concluded, however, that Geneva had become incompetent as of January 1, 2004, that respondent had been acting as a de facto trustee from that date "as to funds of the [Trust] that she received, controlled and managed," and that respondent was required to render an accounting "for her management of assets for the period between Geneva's date of incompetency and the beginning date of the Accounting Respondent already rendered and approved, i.e., from January 1, 2004, to September 9, 2004." Specifically, the court found that respondent "received the sum of $33,059.20 from Trust assets in November of 2003, and that she managed this sum in a joint account."[6] The court's order included this caveat: "Although the Court rules that the additional accounting is required, given that Respondent is found to have been the de facto Trustee during that period, the Court finds that the evidence did not establish that the transfer of $33,059.20 from Trust assets amounted to a breach of Respondent's duties. The testimony of Respondent and the evidence that [was] presented in the form of bank statements, check copies, and other source documentation at trial indicating where money was spent,

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[6] As will be seen, the funds were actually transferred to two joint accounts, one at Bank of America and one at Washington Mutual.

does not show a significant injury to [appellants] that rises to the level of what they already received. While it is not clear what an additional accounting would uncover, [appellants] are entitled to a formal accounting of the Trust assets Respondent controlled and managed for the period January 1, 2004 through September 9, 2004. . . . Unless something more is uncovered in the additional accounting that is not apparent, the harm to [appellants] appears to be de minimis." The court postponed the determination whether either party was entitled to attorney fees for the litigation related to the first accounting.

B. *Additional Accounting*

On December 8, 2015, respondent filed an additional account and petition for settlement (the additional accounting). The additional accounting covered the nine-month period from January 1 to September 9, 2004; it included information for only the two joint accounts held under Geneva's and respondent's names at Bank of America and Washington Mutual. Respondent took the position she was responsible to account only for the approximately $35,000 in Trust assets she actually managed and controlled during the de facto period, and stated in a declaration that she had no access to or management or control over the stocks, other bank accounts or certificates of deposit held in the Trust's name.

According to the additional accounting, $35,026 was disbursed during the nine-month period.[7] The accounting included a category for "Gifts" which totaled $5,400. The primary beneficiary was Darren LaRue, respondent's son. Respondent admitted in the declaration that she had given monetary gifts to "family members" during the de facto period, but stated that she had held a "good faith belief that [Geneva] had the capacity to direct the distributions."

Appellants filed objections, contending that the additional accounting was both late and incomplete because respondent had failed to provide information on all the Trust's assets -- stocks, real property and bank accounts and certificates of deposit other than the joint accounts -- and that respondent had "commingl[ed]" Trust funds with her own funds in the joint accounts. Appellants also contended that aside from the gifts, there were other questionable withdrawals from the two joint accounts described in the additional accounting, such as less than $2,000 in disbursements to Robert LaRue and cash ATM withdrawals of $320, purportedly for Geneva.

Trial on the additional accounting and appellants' objections commenced on April 14, 2016. Respondent was the first witness called to testify. She testified that she took

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[7] According to the additional accounting, the disbursed funds primarily went for household and medical expenses, and the cost of a home health care provider. It stated that the home health care provider had been paid $16,548 during the de facto period.

funds from Geneva's Trust accounts to establish the joint accounts at Geneva's request, and used the money in the accounts to pay Geneva's bills, particularly the home health care worker and property taxes. When respondent was shown documentation from the two joint bank accounts described in the additional accounting, she was unable to say she recognized them or knew what they were because she had not seen them in so long. She was also unable to state with certainty what other accounts and assets were held by Geneva or the Trust when the de facto trusteeship began. She said she had no access to any of Geneva's or the Trust's accounts or assets other than the joint accounts during the de facto period.

The court inquired why there were no bank records or IRS documents for the Trust's assets, other than the two joint accounts. Counsel for respondent explained that not all the banks had records that went back to 2003 or 2004. Respondent testified that she had filed no tax return for Geneva or the Trust in 2004 (for the year 2003) because neither had sufficient income. She further testified that the gifts to her family members were made under the good faith belief that Geneva was competent to authorize them.

At the noon break, after appellants' counsel began cross-examination of respondent, the court inquired whether respondent would be able to answer questions in the afternoon. Respondent stated she was not sure. She explained that she suffered from Parkinson's, that her

medication was wearing off, and that when it did, she would suffer tremors and have trouble forming words.[8]

Trial did not resume that day. During the noon hour, a discussion was held off the record that was summarized a month later, at a May 16, 2006 status conference, at which the court stated: "We started in with a discussion with . . . Ms. La Rue and it didn't appear that she was competent to go forward. And we had the additional problem that we didn't have tax returns to back up the accounting. And then we had the third problem of a misunderstanding of the assets that were covered by the court's accounting [order]. So it didn't appear to the court that we could meaningfully go forward." The court explained that based on these factors it had continued the trial on its own motion.[9]

C. *Supplemental Accounting*

On June 14, 2016, respondent filed a supplement to the additional accounting and petition for settlement (the supplemental accounting). The supplemental accounting stated that the Trust held $745,123.50 in assets at the beginning of the de facto period, including: the two joint

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[8] Respondent's health had been an issue during discovery, as her condition had deteriorated over time.

[9] Code of Civil Procedure section 594a permits the court to postpone a trial "of its own motion," if, among other things, "an amendment of the pleadings or the allowance of time to make such amendment, or to plead, renders a postponement necessary."

bank accounts at Bank of America and Washington Mutual discussed in the additional accounting; four additional bank accounts and certificates of deposit at Wells Fargo and Washington Mutual; stocks; and Geneva's home. The supplemental accounting stated that after receipts of $13,403.79 (dividend and interest income and Geneva's social security payments) and disbursements of $34,526.30, the Trust had $724,000.99 in assets at the end of the de facto period. All the disbursements were made from the two joint accounts. The disbursements included $16,548.00 to the home health care worker, and included "Gifts" totaling $6,867.00, which went primarily to respondent's son. There were also disbursements of less than $2,000 to respondent's husband under the category "Groceries" and $320.00 in cash withdrawals "for Geneva."

Appellants filed objections to the supplemental accounting, again protesting that it was untimely. Appellants also contended that the accounting could not have been prepared with the personal knowledge of the trustee in view of respondent's inability to answer questions concerning backup documents during the April 16 hearing, and asserted that respondent would be unable to provide backup documents, rendering all the entries unauthenticated hearsay. Appellants also noted some slight discrepancies between the various accountings with respect to stocks held and the balances in the bank accounts.

When trial recommenced on January 23, 2017, Kathleen Pattison, a paralegal for respondent's counsel's

firm, testified that she prepared the supplemental accounting on respondent's behalf.[10] She based the schedule of disbursements largely on documents introduced at the first trial, such as bank records and respondent's handwritten check registers, which Pattison personally copied from the exhibit books. During Pattison's testimony, it became clear that she had attempted to subpoena records from the banks holding the joint accounts and the Trust accounts, but that there were no Wells Fargo records available for 2003 or 2004 -- the de facto period and the year preceding it.[11] Washington Mutual and Bank of America had provided records, but the documents they provided did not include copies of all the checks paid.[12] Accordingly, Pattison relied on respondent's check registers to determine

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[10] Appellants' counsel objected to the introduction of the supplemental accounting itself. The court overruled the objection, explaining that it was an operative document, not evidence. The court also ruled that Pattison's testimony was admissible as a summary of the numerous and lengthy documents she reviewed.

[11] The unavailability of Wells Fargo records for the relevant period was confirmed by respondent's expert, Rakesh Ahuja, who had also attempted, without success, to obtain such records from Wells Fargo.

[12] The documents provided by Bank of America and Washington Mutual were introduced into evidence. The Bank of America exhibit was not included in the record on appeal; the Washington Mutual exhibit was included but appears to be incomplete.

the payee of some of the checks.[13] Pattison further testified that the information concerning the stocks held by the Trust in 2003 and the de facto period was derived primarily from the information contained in the first accounting; Pattison concluded, based on the dividend income received during 2003 and the de facto period (evidenced by deposits into the joint accounts), that there was no substantial change in the number or value of the stocks held.

Respondent also called Rakesh Ahuja, a certified public accountant, as an expert witness. Ahuja expressed the opinion that the supplemental accounting was reasonable and accurate. He based his opinion on information he received from the IRS concerning Geneva's and/or the Trust's income in 2002 through 2005, including all interest and dividend income.[14] He calculated the Trust's income

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[13] Appellants objected to the introduction of respondent's check registers for the Bank of America and Washington Mutual accounts on authentication and hearsay grounds. The court overruled the objections, observing that the registers had been used as exhibits in the previous trial without objection by either party.

[14] Ahuja testified respondent had signed a power of attorney authorizing him to contact the IRS to obtain income tax information. (The court admitted the signed power of attorney into evidence after it was authenticated.) Ahuja asked for and received "IRS transcripts" for the years 2002 through 2005. An IRS transcript, also known as a certificate of assessments and payments, "is an official, certified, IRS transcript of the record of the account of a taxpayer for a certain stated period of time. It is available to the taxpayer upon request." (*Banks v. U.S.*
(*Fn. is continued on the next page*.)

based on the assets listed on the supplemental accounting, compared it to the IRS's record of income for the pertinent years, and concluded the supplemental accounting was accurate. His calculations, as well as the IRS documents, showed that not counting social security payments to Geneva, income in 2002 and 2003 was approximately $9,000 per year.

Respondent was called by appellants and as before, was unable to remember precisely what assets were in the Trust at the beginning of the de facto period, some 13 years earlier.

In their closing arguments, appellants contended that respondent had failed to establish the correctness of the accounting with appropriate backup documentation for over $22,000 of the approximately $34,000 in disbursements. They claimed as damages the entire $22,000 and in addition, claimed to each be entitled to the $6,867 paid out as gifts. Alternatively, they contended they were each entitled to an amount equal to any improper disbursement from Trust funds to respondent or her immediate family members

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(N.D.Ohio, Mar. 27, 2009, Case No. 1:08cv849) 2009 U.S. Dist. LEXIS 30225, *2, fn. 3; see *Drilling v. Commissioner of Internal Revenue* (U.S. Tax. Ct. 2016) 111 T.C.M. (CCH) 1445, fn. 3.) Appellants objected on hearsay and authentication grounds to Ahuja's opinion concerning the Trust's assets and income, insofar as he relied on the IRS transcripts. The court overruled the objection, observing that the transcripts were official records produced in response to Ahuja's request.

during the de facto period. For reasons not entirely clear, they calculated that amount to be $18,349. They contended this amount should be doubled under Probate Code section 859, and that prejudgment interest should be added, bringing the total to $58,718.

Respondent, in closing, pointed out that appellants had "vouched for the relevance and authenticity of [the] source documents at [the first] trial, even obtaining testimony from both [respondent] and her husband . . . that the handwriting in the check registers . . . was in fact [respondent's]." She pointed out that the only area requiring reconstruction was "ascertaining the balances of four Wells Fargo Bank accounts held by the Trust, . . . for which no 2004 statements were able to be found," and that Ahuja testified that the starting asset inventory values were reasonable. Respondent acknowledged the $6,867 in gifts "might not be found by the Court to be valid gifts from Geneva," but pointed out that appellants' 2-1/2 percent share would amount to $172 each and because appellants had received approximately $2,200 more than their percentage share in 2006, they were not damaged.

By order dated April 24, 2017, the court approved the supplemental accounting and overruled appellants' objections. The order stated: "The [supplemental accounting] was in compliance with the Probate Code and its sufficiency was proved at trial. The evidence presented to prove the [supplemental accounting] included, but was not limited to, financial statements, check copies, and

handwritten check registers that were introduced into evidence by [appellants], authenticated by [appellants], and relied upon by [appellants] in their case in chief in the trial on the [first accounting]. Said check register evidence also met all requirements of various exceptions to the hearsay rule, including but not limited to the doctrine of past recollection recorded. In addition, Respondent offered credible expert testimony regarding the sufficiency of the [supplemental accounting], and [appellants'] expert witness gave no credible evidence contradicting the sufficiency of the [supplemental accounting]."[15]

The order went on to state that respondent "acknowledged that she made unauthorized distributions in the amount of $6,867 during the De Facto Period" and that "[t]his sum should be added to the Trust assets available for distribution to the beneficiaries at the termination of the Trust administration in 2006." However, respondent "distributed to [appellants] more than their respective 2.5% shares in the Trust," and "[t]he extra funds distributed to [appellants] in 2006 amount to more than their rightful shares, even after adding and recapturing the sum of $6,867 to the Trust." Thus, "no additional amount is owed to [appellants] and they have suffered no damages by the

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[15] Appellants' expert, James Cadman, testified there was a small -- $2,353.92 -- discrepancy between the first accounting and the supplemental accounting, and that the $6,867 in gifts was a preliminary distribution to respondent's son, entitling the other grandchildren to a similar distribution.

Respondent's conduct. Under *Estate of Giraldin*, [*supra*, 55 Cal.4th 1058] and as more particularly described in the [statement of decision], the lack of damage to [appellants'] interests precludes them from asserting any claims against Respondent for breaches of duty during the De Facto Period. Given that the recapture amount does not affect the final Trust distributions, there is no need to modify the [supplemental accounting] before approving it."

D. *Attorney Fees and Costs*

Respondent moved for an award of attorney fees under Probate Code section 17211 and Code of Civil Procedure section 128.5. She claimed to have incurred over $200,000 in legal fees and $36,000 in costs defending the claims, not including the cost of preparing the accountings. She broke this down to approximately $28,000 in fees and costs for settlement negotiations; approximately $25,000 in fees in demurring to appellants' petitions; nearly $54,000 in fees and costs during discovery prior to the trial on the first accounting; approximately $66,000 in fees and costs in preparation for and during the trial on the first accounting; approximately $10,000 in fees and costs during discovery prior to the trial on the additional accounting and supplemental accounting; nearly $45,000 in fees and costs in preparation for and during the trial on the supplemental accounting; and approximately $6,500 in costs and fees

during the post-trial period.[16] Respondent contended that "no reasonable attorney" would have filed the original petition or any of the amendments, that discovery had been used to "browbeat" her, and that appellant's contest of the second accounting was "baseless[]."

At a hearing on April 24, 2017, the court granted the motion in part "pursuant to [the] Probate Code . . . and Code of Civil Procedure section 128.5."[17] The court awarded attorney fees in the amount of $82,775.79, consisting of: $40,234.39 for work related to trial preparation and the trial on the first accounting; $7,928 for work related to discovery in connection with the de facto period; $28,858.90 for work related to trial preparation and trial on the de facto period; and $5,754.50 for post-trial work. It stated that the balance of the costs were reserved pending the filing of a memorandum of costs.

In May 2017, respondent submitted a cost memorandum. Included was a $12,000 item for expert witness fees. Appellants moved to strike a number of items on the

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16 Although respondent's moving papers asserted that these figures included "costs" and mentioned hiring an expert, no expert witness fees appear to have been included in these amounts. The costs appeared limited to billings for paralegal assistance.

17 In this preliminary order, the court referenced a provision of the Probate Code that had been repealed. The later order referenced section 17211, the provision under which respondent had sought attorney fees.

memorandum, including the exert witness fees. Respondent contended such fees were available under Probate Code section 17211.

The court awarded the expert witness fees, stating in its order of October 4, 2017 that Probate Code section 17211, subdivision (a), permits the award of "all litigation expenses relating to the contest," and "claims for damages and surcharge, may be awarded against the unsuccessful contestant." The order also stated that Code of Civil Procedure section 128.5 provides for "attorney fee and cost shifting . . . ." It stated that the expert witness fee amount -- $12,000 -- was reasonable.

The October 4 order also explained in greater depth the court's attorney fee award. With respect to the first trial, the court stated: "[A]t the conclusion of the 2015 Trial, the Court approved the Respondent's [first accounting] in its entirety and found that [appellants] had not demonstrated that they had suffered damages. However, the Court also f[ound] that Respondent had acted as De Facto Trustee of the Trust for a period before the [first accounting], and ordered an accounting for that 'De Facto Period' of January 1, 2004, through September 9, 2004. Because [appellants] were partially successful in demonstrating that Respondent had fiduciary obligations during a period before her [first accounting] Period, the Court does not find that their actions relating to the portion of the 2015 Trial were without reasonable cause and in bad faith. Rather, [appellants] had reasonable cause to use the legal process to determine

whether Trustee Geneva Baird was incompetent before September 10, 2004 and to argue that Respondent should be considered a De Facto Trustee. The Court finds that about one-third of Respondent's attorneys' fees and costs to prepare for and conduct the 2015 Trial was reasonably related to the question of De Facto Trusteeship before September 10, 2004; and the remaining two-thirds of said fees and costs was allocable to [appellants'] objections to the [first accounting] and related litigation against Respondent." With respect to the second trial, the court stated: "Before, during, and after the 2015 Trial, [appellants] repeatedly asserted to the Court that they would prove that Respondent had concealed assets belonging to the Trust, and that [appellants] had suffered damages. At no time did [appellants] present any such evidence. Moreover, the evidence presented at the 2015 Trial demonstrated that [appellants] had ample foreknowledge that they would not be able to demonstrate damages or the existence of additional assets; yet they pressed through the 2015 Trial and further litigation."

Based on these findings and the standards applicable under Probate Code section 17211, subdivision (a), and Code of Civil Procedure section 128.5, the court found that "a portion of the actions and tactics by [appellants] in this litigation [was] without reasonable cause, in bad faith, frivolous and/or solely intended to cause unnecessary delay, and will shift liability for Respondent's attorney's fees and costs as to those matters to [appellants]." Specifically, the

court awarded respondent attorney fees for "[t]he two-thirds of the 2015 Trial relating to preparation for and trial on [appellants'] objections to the [first accounting] and related litigation against Respondent" and for "[a]ll proceedings in this matter after the 2015 Trial." The court stated that respondent's fees and costs to prepare the first accounting and the accountings for the de facto period were omitted because "Respondent acknowledged, and the Court finds, that [appellants] were entitled to accountings for Trust transactions and no fee shifting is appropriate." Similarly, for litigation connected with pretrial proceedings, the court awarded no attorney fees, finding that although appellants had amended their pleading multiple times and that demurrers had been sustained to many causes of action, appellants "had the right to use the litigation process to explore whether they had suffered any damages, and [appellants] did not act without reasonable cause or in bad faith in opposing the Demurrers or bringing and/or amending the various petitions."

Appeals were taken from the April 24, and October 4, 2017 orders. The appeals were consolidated.

DISCUSSION

A. *Evidence Supporting the Supplemental Accounting and the Expert Testimony*

We begin with a discussion of appellants' contentions that respondent failed to support the supplemental accounting with satisfactory evidence, and that respondent's

expert testimony was inadmissible. Appellants contend the documents that backed up the supplemental accounting and Ahuja's testimony were admitted without foundation to support their authenticity and in violation of the hearsay rule. For the reasons set forth, we disagree.

With certain exceptions not pertinent here, Probate Code section 16062 requires that a trustee account "at least annually" and "at the termination of the trust" to each beneficiary "to whom income or principal is required or authorized in the trustee's discretion to be currently distributed." (See *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1102-1103 [among the duties a trustee owes to the beneficiaries of a trust are "the duty to report and account"].) An account furnished pursuant to section 16062 should include: "(1) A statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust or since the last account" and "(2) A statement of the assets and liabilities of the trust as of the end of the last complete fiscal year of the trust or as of the end of the period covered by the account." (Prob. Code, § 16063, subd. (a).)

Trustees are obliged not only "to render to beneficiaries a full account of all their dealings with the trust property," but also "to prove every item of their account by 'satisfactory evidence.'" (*Estate of McCabe* (1950) 98 Cal.App.2d 503, 505.) "When a personal representative files an account, it is properly made under oath, and, generally speaking, if the account is not questioned this is sufficient proof of the verity

of the entries." (*Estate of Miller* (1968) 259 Cal.App.2d 536, 549.) If the accounting is contested, however, it must be resolved at an evidentiary hearing with competent evidence, and the verified pleading of the trustee in support of his account is not sufficient to support approval. (*Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 621; *Estate of Lensch* (2009) 177 Cal.App.4th 667, 676; see *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1309 ["'All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.' [Citation.]"].) At the hearing, the evidence submitted by the trustee must show that the "disbursements were correct in amount and that the disbursements claimed were for proper purposes . . . ." (*Neel v. Barnard* (1944) 24 Cal.2d 406, 420; accord, *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1316, fn. 4.) "[T]he burden of proof is on [the trustee] and not on the beneficiary; and any doubt arising from [the] failure to keep proper records, or from the nature of the proof [the trustee] produce[d], must be resolved against [the trustee]." (*Estate of McCabe*, *supra* at p. 505; accord, *Blackmon v. Hale* (1970) 1 Cal.3d 548, 560; *Purdy v. Johnson* (1917) 174 Cal. 521, 527.) If a trustee fails to justify a disbursement or provide admissible evidence to support it, the court may disallow it. (*Neel v. Barnard*, *supra*, at p. 420.)

We review a probate court's factual findings for substantial evidence. (*Estate of Kampen* (2011) 201 Cal.App.4th 971, 992.) ""It is not our task to weigh conflicts

and disputes in the evidence; that is the province of the trier of fact.'"" (*Ibid.*) "'All presumptions favor the trial court's ruling, which is entitled to great deference . . . .'" (*Ibid.*) Its legal determinations on undisputed facts are reviewed de novo. (*Blech v. Blech* (2018) 25 Cal.App.5th 989, 1000.) We review the court's ruling, not its reasons, "and affirm if the ruling is correct albeit the reasons are not[.]" (*Id.* at p. 999.)

The supplemental accounting reported disbursements of approximately $35,000 during the de facto accounting period. Pattison testified that the disbursements were supported by copies of banks records for the joint accounts, including some copies of checks, and respondent's handwritten check register, which showed the identities of the payees and the purposes of the disbursements. Appellants claim these documents and the accounting itself were not properly admitted as they were not authenticated. As this court stated in *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, "a document is authenticated when sufficient evidence has been produced to sustain a finding that the document is what it purports to be (§ 1400)." (*Id.* at p. 321.) The trial court has "'broad discretion in determining whether a sufficient foundation has been laid'" and "'we will reverse a trial court's ruling on such a foundational question only if the court clearly abused its discretion.'" (*Id.* at p. 319; see *McIntyre v. The Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 670 [all of trial court's evidentiary rulings are reviewed for abuse of discretion].) Pattison testified that that she copied the bank records and check registers from

the exhibit book for the trial on the first accounting and summarized them to prepare the information on the supplemental accounting. As these were exact copies of documents admitted in that trial after the stipulation of the parties and used to establish the correctness of the first accounting, the court could reasonably conclude there was no real question concerning their authenticity or whether these documents were what they purported to be.

Appellants claim that the bank records and check registers were hearsay, and that appellants preserved their right to object on that ground, despite having stipulated to the admission of these documents at the trial on the first accounting. We disagree. Appellants do not dispute that they relied on these documents during the trial on the first accounting, and in particular, used them when examining respondent in an effort to establish that certain disbursements had been made.[18] If a party relies on documents in a prior related hearing, the court at a later hearing involving the same parties may admit the documents under the adoptive admission exception to the hearsay rule. (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 524 [where party relied on certain documents during arbitration, other party could subsequently introduce same documents as an adoptive admission in a motion to amend judgment to add first party

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[18] Nor do appellants dispute that the bank-produced documents were business records. (See Evid. Code, § 1271.)

as judgment debtor]; see Evid. Code, § 1221 ["Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."]; *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 856 [where defendants relied on certain documents to support their motions for summary judgment, there was no merit to their objections to the same documents submitted in support of plaintiff's motion, and objections based on authentication, foundation, hearsay and relevance should not have been sustained].)

Appellants contend Ahuja's testimony should have been excluded because his opinion that the supplemental accounting was accurate and that the assets held by Geneva or the Trust were substantially as represented in the accounting improperly relied on hearsay. In this regard, appellants express concern that Ahuja relied on the supplemental accounting itself. Appellants misperceive Ahuja's testimony and the significance of it. Ahuja did not rely on the supplemental accounting; he sought to independently ascertain its accuracy with respect to its reporting of the assets for which no documentation could be found -- the stocks and the Wells Fargo accounts and certificates of deposit. To accomplish this, he obtained IRS documents showing income for Geneva and/or the Trust in

the years surrounding the de facto period.[19] Comparing those figures to the income that was or would have been generated by the assets reported in the supplemental accounting, he concluded that the accounting was accurate with respect to the assets reported. Ahujas's expert testimony was admissible for this purpose, and did not violate any rule precluding expert reliance on hearsay or other inadmissible evidence.

Finally, appellants contend that respondent's inability to speak for herself in defense of the supplemental accounting and the supporting documentation required the court to appoint a new trustee. A trustee may be removed if it is demonstrated that he or she is "substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute properly the duties of the office." (Prob. Code, § 15642, subd. (b)(7).) Here, respondent

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[19] The IRS documents themselves were authenticated by Ahuja's testimony that he received them in response to his request. (See 2 Witkin, Cal. Evidence (5th ed. 2012) Documentary Evidence, § 17, p. 162 ["If a letter or telegram is sent to a person and a reply is received in due course purporting to come from that person, this is sufficient evidence of genuineness."]; Evid. Code section 1420 ["A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing."].) The IRS documents were admissible over a hearsay objection as an official record. (Evid. Code, § 1280; *Jazayeri v. Mao*, *supra*, 174 Cal.App.4th at pp. 317-319.)

had accomplished everything required of her office except obtaining approval of the supplemental accounting. However, her counsel's office was able to finalize the accounting with the bank records and other documents produced by respondent and admitted in evidence at the trial on the first accounting, plus the documents obtained from the IRS and Ahuja's expert testimony. No purpose would have been served by appointing a new trustee other than to delay matters and drain Trust assets, as nothing suggested better documentation would have been available to a new trustee.

B. *Failure to pay filing fee*

When the second trial began on March 6, 2017, appellants asked the court to dismiss the additional accounting and petition for approval because the filing fee had not been paid.[20] The court expressed the belief that it could waive the fee, but subsequently found that the fee had been paid after being shown a dated receipt by respondent's counsel during a hearing. We have no basis to overturn the court's factual finding that the necessary fee had been paid.

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[20] Appellants bring to our attention a notice or comment that purportedly appeared in the clerk's file stating "[s]ince this petition was captioned as a 'supplement' to accounting, [it] appears that no fees were paid and that it should not have been set for hearing or calendared; [Court] to require payment of filing fees of 435 plus 60 for court reporter fee?"

Moreover, we reject appellants' argument that failure to pay a filing fee for a supplemental accounting is a jurisdictional defect that renders the trial court powerless to hear and determine a case. "[A] party's failure to comply with a mandatory requirement 'does not necessarily mean a court loses fundamental jurisdiction resulting in "'an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.'" [Citations.] It is a 'misuse of the term "jurisdictional" . . . to treat it as synonymous with "mandatory"' as a general matter. [Citation.] 'There are many time provisions, e.g., in procedural rules, that are not directory but mandatory; these are binding, and parties must comply with them to avoid a default or other penalty. But failure to comply does not render the proceeding void' in a fundamental sense." (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 341, italics omitted.)

C. *Continuance on Court's Own Motion on April 14, 2016*

Appellants contend the court abused its discretion in continuing the trial on April 14, 2016, contending respondent "failed to demonstrate any diligence in adequately preparing for the second trial" and "gave no cause for a continuance." The trial court exercises discretion in determining whether to continue a trial, and its ruling will not be disturbed unless clear abuse is shown. (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002, fn. 11;

Hernandez v. Superior Court (2004) 115 Cal.App.4th 1242, 1246.) Respondent had no obligation to demonstrate diligence or cause as the hearing was continued on the court's own motion under Code of Civil Procedure section 594a, which permits the court to postpone a trial if "an amendment of the pleading, or the allowance of time to make such amendment, or to plead, renders a postponement necessary."

The court's conclusion that a postponement was necessary to allow respondent to submit a supplemental accounting was not unreasonable. The contents of the additional accounting submitted in December 2015 represented understandable confusion regarding the court's statements in the prior order that because respondent "received the sum of $33,059.20 from Trust assets in November of 2003, and . . . managed this sum," she should render an accounting "as to funds of the [Trust] that she received, controlled and managed" for the period January 1 to September 9, 2004. (Emphasis omitted.) The additional accounting complied with the order, as it included a statement of receipts and disbursements from the two joint accounts respondent managed and controlled during that period. When the court concluded that a statement of all assets held by the Trust during and prior to the de facto

period should have been included, it continued the hearing to allow respondent time to assemble that information.[21]

Appellants contend that instead of continuing the hearing when it realized a supplement to the additional accounting would be necessary, the court should have issued a ruling tantamount to a judgment or directed verdict in their favor. Appellants misperceive the posture of the case when the court continued the trial. Respondent had submitted an accounting showing the disbursements from the two joint accounts, the only two accounts she managed and controlled and the only accounts from which disbursements had been made. Settled law permits the court to "disallow[]" a disbursement if a trustee fails to justify or provide admissible evidence to support it and require the trustee to return the funds. (See *Neel v. Barnard*, *supra*, 24 Cal.2d at p. 420.) While respondent herself proved unable to explain the accounting or authenticate the backup documents during her testimony, nothing suggests Kathleen Pattison could not have done so, as she did when the trial resumed. We are aware of no authority that would have permitted the court to enter a judgment when the court itself suspended respondent's

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[21] It is clear from the record that the court was also concerned about respondent's health and her ability to testify coherently as her Parkinson's medication wore off. That alone justified a temporary halt in the proceedings.

evidentiary presentation and continued the matter on its own motion.

D. *Appellants' Request for Continuance*

Appellants contend the trial on the supplemental accounting should have been continued on January 23, 2017, the day the trial on the de facto period recommenced. The record reflects that on that day, appellants requested a continuance of the trial because their expert, James Cadman, who was expected to testify that the supplemental accounting was "noncompliant" with probate standards, was ill. The court questioned the materiality of the expected testimony, and ascertained that counsel had obtained no medical opinion to support that Cadman was unable to leave his home to attend trial. The court then inquired whether counsel for all parties would be willing to stipulate to have Cadman testify by declaration or Skype. Counsel for all parties agreed, and appellants' counsel specifically agreed there was no reason to continue the matter. As appellants' own counsel stipulated to having Cadman testify by declaration or Skype rather than continue the matter, they have no basis to challenge the court's actions on appeal.

E. *Amount of Respondents' Unauthorized Disbursements*

Appellants contend the evidence established respondent wrongfully disbursed more than the $6,867 found by the court. They cite not to any evidence, but to the trial

brief they submitted prior to the trial on the first accounting, which discussed various withdrawals and disbursements made by respondent during the period following September 9, 2004 covered by the first accounting. Those withdrawals and disbursements were resolved by the ruling on the first accounting, which was not appealed and has become final. (*Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 591, 592 ["An order settling a trustee's account" including an "order[] approving intermediate accounts of a trustee" "is conclusive as to all matters passed upon."].)

The court's finding that only the $6,867 reported as gifts had been improperly disbursed by respondent was supported by the evidence presented at trial. Its finding that this figure would not lead to recovery of damages by appellants because they had been overcompensated by respondent in 2006 was also supported. Appellants have provided no basis for overturning the findings or to support their contention that they were entitled to damages.

F. *Attorney Fees*

The court awarded attorney fees to respondent under Probate Code section 17211 and Code of Civil Procedure section 128.5. Appellants contend sanctions were unavailable under section 128.5 because respondent failed to comply with certain procedural requirements, including the "safe harbor" requirement that the moving party serve the motion on the opposing party 21 days before filing it with the court. (See Code Civ. Proc., § 128.5, subd. (f)(1)(B); 128.7,

subd. (c)(1); *Nutrition Distribution, LLC v. Southern SARMs, Inc.* (2018) 20 Cal.App.5th 117, 127-130; see also Code Civ. Proc., § 128.5, subd. (f)(1)(A) [moving papers must "describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay"].) We need not address this issue. As explained in *Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1597, the Legislature enacted section 17211 of the Probate Code in 1996 to parallel a similar provision -- Probate Code section 11003, permitting attorney fee awards in litigation over probate estate accounting. Prior to its enactment, parties to a suit to settle a trustee account were obliged to rely on section 128.5, which applied a """"totally and completely without merit""" standard, that """appear[ed] to be more narrow than those incorporated into Probate Code section 11003,""" and the Legislature intended that """the broader standards of Section 11003 should be adopted and should apply whether the contest occurs during the administration of a probate estate or upon settlement of a trustee's account.""" (*Leader v. Cords*, *supra*, at p. 1597, italics omitted; accord, *Chatard. v. Oveross* (2009) 179 Cal.App.4th 1098, 1110 ["[I]n enacting section 17211, the Legislature intended . . . to apply the same standard to [trustee's accounting] litigation as it applied to litigation about estate administration."].) As Probate Code section 17211 is directly applicable and broader than Code of Civil Procedure section 128.5, we need not consider whether sanctions were available under the latter provision.

Probate Code section 17211, subdivision (a), provides: "If a beneficiary contests the trustee's account and the court determines that the contest was without reasonable cause and in bad faith, the court may award against the contestant the compensation and costs of the trustee and other expenses and costs of litigation, including attorney's fees, incurred to defend the account." In enacting section 17211, "the Legislature intended to discourage frivolous litigation about a trustee's accounting . . . ." (*Chatard v. Oveross*, *supra*, 179 Cal.App.4th at p. 1110.) The provision is a "remedial statute" and "'"must be liberally construed 'to effectuate its object and purpose, and to suppress the mischief at which it is directed.' [Citations.]"' [Citations.]" (*Leader v. Cords*, *supra*, 182 Cal.App.4th at pp. 1597, 1598.)

"Reasonable cause is evaluated under an objective standard of whether any reasonable person would have tenably filed and maintained the objection." (*Powell v. Tagami* (2018) 26 Cal.App.5th 219, 234; accord, *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 926 ["'Reasonable cause,' when used with reference to the prosecution of a claim, ordinarily is synonymous with 'probable cause' as used in the malicious prosecution context. [Citation.] . . . [¶] . . . There is no probable cause to prosecute an action . . . if no reasonable attorney would believe that the action had any merit and any reasonable attorney would agree that the action was totally and completely without merit."].) "Bad faith involves a subjective determination of the contesting party's state of mind -- specifically, whether he or she acted

with an improper purpose. [Citations.]" (*Powell v. Tagami*, *supra*, at p. 234.) "'"A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence.'" [Citation.]" (*Ibid.*)

"'We independently review any legal issue regarding the appropriate criteria for a fee award. But once those criteria are identified, we defer to the trial court's discretion in determining how they are to be exercised. [Citation.] In fashioning an equitable remedy, the trial court is in the best position to determine whether the criteria for a fee award have been met. We will not disturb its judgment on this issue unless we are convinced the court abused its discretion. [Citation.] A trial court abuses its discretion only where its action is clearly wrong and without reasonable basis.' [Citation.]" (*Powell v. Tagami*, *supra*, 26 Cal.App.5th at pp. 236-237.)

The court made its reasons for awarding attorney fees to respondent clear, "Before, during, and after the 2015 Trial, [appellants] repeatedly asserted to the Court that they would prove that Respondent had concealed assets belonging to the Trust, and that [appellants] had suffered damages. At no time did [appellants] present any such evidence." The court further concluded based on the conduct of both trials and the evidence presented that appellants had "ample foreknowledge that they would not be able to demonstrate damages or the existence of additional assets[.]" The court shifted only a portion of the costs of the 2015 trial,

acknowledging that appellants were "partially successful in demonstrating that Respondent had fiduciary obligations during a period before [the first accounting] Period" and that appellants had "reasonable cause to use the legal process to determine whether [Geneva] was incompetent before September 10, 2004 and to argue that Respondent should be considered a De Facto Trustee." It also omitted the costs involved in preparing the various accountings because appellants "were entitled to Accountings for Trust transactions and no fee shifting is appropriate."

Our review of the record reveals no basis for overturning the court's determinations. Appellants presented no evidence to support their speculative claim that Geneva or the Trust had assets other than those listed in the accountings. With respect to expenditures, Geneva was elderly and suffering from Alzheimer's, and needed constant care. During the first accounting period, the bulk of the disbursements of approximately $95,000 went to the assisted living facility, a home health care provider, household and medical expenses, and the cost of fixing the home for sale. None of the reported amounts appeared unreasonable, and appellants would have had to prove that all of the monies were misapplied to obtain even a minimal recovery, given the evidence that respondent had overpaid them for their 2-1/2 percent share.

During the de facto period, out of the approximately $35,000 at issue, over $16,000 went to the home health care provider. Thousands of the remainder went for medical care,

supplemental insurance, doctor's visits and prescription drugs. Other funds went for groceries, utilities and upkeep on the home. There was no basis to question any of the amounts set forth in the supplemental accounting, apart from the gifts and possibly some portion of the few thousand dollars paid to respondent's husband to reimburse him for groceries. But even if the entire $35,000 had been squandered, appellants would not have been damaged, as their 2-1/2 percent share would not have exceeded the $2,200 in additional funds respondent disbursed to them years earlier when she did her informal accounting. With so little on the line and no real evidence to indicate any major wrongdoing, the court's conclusion that no reasonable attorney would have pursued the litigation was wholly justified. The matter was overlitigated at every point, with appellants raising meaningless objections, such as their claim that the supplemental accounting requested by the court was "untimely" or their claim that respondent wrongfully "commingled" accounts, when respondent acknowledged that the two joint accounts at issue were entirely the property of the Trust. Their refusal to stipulate to exhibits to which they had once agreed was further proof of litigation for its own sake. Appellants appeared to be seeking to take advantage of any misstep by respondent in her memory or her record keeping, rather than to uncover any major defalcations. Under the circumstances, the court's award of a portion of respondent's attorney fees did not represent an abuse of discretion.

G. *Expert Witness Fees*

Appellants contest the award of expert witness fees. The general rule is that expert witness fees are not considered a subset of attorney fees, and where a statute permits the recovery of attorney fees, but is silent concerning expert witness fees, expert witness fees are not authorized. (See, e.g., *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1148, 1156-1157 [examining Code of Civil Procedure section 1021.5]; *Kinsey v. Union Pacific Railroad Co*. (2009) 178 Cal.App.4th 201, 204 [examining Federal Employer Liability Act].) Nor are expert witness fees considered allowable costs, unless the expert witness was "ordered by the court." (Code Civ. Proc., § 1033.5, subds. (a)(8) & (b)(1).) As the court explained in *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1624-1625: "In numerous specific types of cases the Legislature has seen fit to require the losing party to reimburse the prevailing party for the payment of expert witness fees. And in any case in which the court appoints an expert and apportions the expense to the parties, the prevailing party may recover his or her share of the expense as a cost of litigation. [Citations.] When the numerous statutory provisions in which expert witness fees are expressly declared recoverable are considered together with the express prohibition against the inclusion of such fees in a cost award otherwise, the Legislature's intent becomes clear. The Legislature has reserved to itself the power to determine selectively the types of actions and circumstances in which expert witness

fees should be recoverable as costs and such fees may not otherwise be recovered in a cost award."

Probate Code section 17211 does not mention expert witness fees. Respondent cites no authority for the proposition that they are recoverable under the statute and we are aware of none.[22] Respondent attempts to persuade us that Ahuja was appointed by the court and that his fees are recoverable under Code of Civil Procedure section 1033.5, subdivision (a)(8). It is true that at the hearing, the court stated that it seemed to recall that it had ordered respondent to hire a forensic accountant. We have, however, reviewed the transcript of the hearing when the court continued the trial and instructed respondent to prepare the supplemental accounting. There is no mention of hiring an expert. Instead, the court directed respondent to obtain bank and IRS documents. Respondent hired Ahuja to estimate Trust assets based on income information collected by the IRS because she did not have the requisite documents and they were no longer available from other sources. "The fact that an expert is necessary to present a party's case does not mean that expert has been ordered by the court for purposes of recovery of expert witness fees as costs. [Citation.]" (*Sanchez v. Bay Shores Medical Group* (1999) 75 Cal.App.4th 946, 950; accord, *Baker-Hoey v. Lockheed Martin Corp*.

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[22] Nor are we directed to authority for the proposition that expert witness fees are recoverable as sanctions under Code of Civil Procedure section 128.5.

(2003) 111 Cal.App.4th 592, 601.) As there is no authority supporting the award of expert witness fees, that portion of the order awarding costs must be reversed.

H. *Attorney Fees on Appeal*

Respondent requests an award of costs and attorney fees on appeal under rule 8.278 of the Rules of Court and Probate Code section 17211. Generally, a statute authorizing the award of attorney fees at the trial court level will be construed as permitting the party prevailing on appeal to recover attorney fees. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499; accord, *Roe v. Halbig* (2018) 29 Cal.App.5th 286, 313; *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 265.)

As discussed, Probate Code section 17211 authorizes the award of attorney fees only if the litigant acts "without reasonable cause and in bad faith," that is, if "no reasonable attorney would believe that the action had any merit and any reasonable attorney would agree that the action was totally and completely without merit." (*Uzyel v. Kadisha*, *supra*, 188 Cal.App.4th at pp. 926-927.) We have found the appeal to be meritorious in part, as evidenced by our reversal of the order awarding expert witness fees to respondent. In addition, the evidentiary contentions raised by appellants, although unsuccessful, were not entirely without merit. Accordingly, we conclude that neither party is entitled to costs or attorney fees on appeal. (See *Powell v.*

Tagami, supra, 26 Cal.App.5th at p. 238 [affirming award of attorney fees by trial court under Probate Code section 17211, but awarding none on appeal]; *Carpenter v. Jack in the Box Corp*. (2007) 151 Cal.App.4th 454, 472-473 [upholding award of attorney fees by trial court under Code of Civil Procedure section 128.5 for litigation of "frivolous" anti-SLAPP motion, but denying award on appeal because appeal raised novel legal issue]; cf. *Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 275-276 [awarding attorney fees on appeal under Code of Civil Procedure section 128.5 where appellant's legal arguments on appeal were as "devoid of merit" as his arguments before trial court].)

DISPOSITION

The portion of the court's order requiring appellants to pay respondent's expert witness fees is reversed. In all other respects, the orders are affirmed. Each party is to bear his or her own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.